Filed 7/13/12 Sanudo v. City of Long Beach CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ANA SANUDO, Plaintiff and Appellant, v. CITY OF LONG BEACH et al., Defendant and Respondent.	B236584 (Los Angeles County Super. Ct. No. NS023831)

APPEAL from an order of the Superior Court of Los Angeles County. Patrick T. Madden, Judge. Affirmed.

Law Offices of Daniel A. Gibalevich, Daniel A. Gibalevich and Gina Akselrud, for Plaintiff and Appellant.

Houle & Houle, Gregory Houle and Richard Houle for Defendant and Respondent County of Los Angeles.

Robert E. Shannon, City Attorney and Theodore B. Zinger, Deputy City Attorney, for Defendant and Respondent City of Long Beach.

Plaintiff Ana Sanudo was injured after she tripped and fell on a sidewalk in Long Beach. She failed to present a timely notice of claim to the appropriate government entity as required by the Tort Claims Act (TCA; Gov. Code, § 905, et seq.). The County of Los Angeles (County) and City of Long Beach (City) denied Sanudo's applications for leave to present a late claim. The trial court subsequently denied Sanudo's petition for relief. We affirm the trial court order.

FACTUAL AND PROCEDURAL BACKGROUND

Sanudo alleged that on October 3, 2009, she was walking on a sidewalk on her way to the entrance of the Long Beach Comprehensive Health Center (Health Center). She tripped on a raised and cracked portion of the sidewalk. She fell and was injured. Sanudo was diagnosed with a "severe tear of the rotator cuff, shoulder dislocation and a possible shoulder fracture," as well as a left wrist fracture. She was also told she would need surgery on her knee. After the fall Sanudo was "immobile" and depended on her family for help with daily activities. In a declaration submitted to the trial court, Sanudo declared her husband had to help her get out of bed. He physically lifted her to take her from one room to another in her house. Once she was placed on the couch, Sanudo could not move around or get up without help. She was forced to use a portable toilet if left home alone. She could not shower without assistance. In late April 2010, Sanudo regained some mobility. In late May 2010, she retained an attorney.

According to Sanudo's counsel, once Sanudo retained his office, counsel sent a "preservation of evidence letter" to the Health Center. On or around September 17, 2010, Sanudo's counsel was "surprised" to receive a call from a Los Angeles County representative. The representative informed Sanudo's counsel that the Health Center was housed in a County building, and Sanudo would have to present a claim to the County. Counsel further declared: "There were no indicators as to the true nature of the landowner to point anyone in the direction of the County of Los Angeles. Once I learned of the County's involvement, an application for leave to present a late claim was filed with the County Board of Supervisors. A similar claim was transmitted to the Clerk of the City of Long Beach." The applications were dated September 29, 2010, and were

delivered on October 4, 2010. The applications asserted Sanudo's claim was not presented within the required six-month period because she was physically incapacitated and therefore unable to present a claim, and because of mistake, inadvertence and inexcusable neglect. Both applications were denied.

In April 2011, Sanudo filed a petition in the superior court for an order relieving her from the provisions of Government Code section 945.4.[1] The trial court denied the petition. Sanudo timely appealed.

DISCUSSION

I. Applicable Legal Principles

Under the TCA, a person seeking to file a personal injury complaint against a public entity must first file a claim with the governmental entity within six months of the accrual of the cause of action. (§ 911.2, subd. (a); *Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1776 (*Munoz*).) If the claimant misses the six-month deadline, she may apply to the entity for leave to present a late claim. (§ 911.4.) The application must be presented to the entity "within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim." (§ 911.4, subd. (b).) If the entity denies the application, the claimant may petition the superior court for relief pursuant to section 946.6. (*Munoz, supra,* at pp. 1776-1777.)

Under section 946.6, the court shall grant relief from failure to present a timely claim to the governmental entity if (1) the court finds the application to present a late claim was made within a reasonable time not exceeding one year as set forth in section 911.4, and (2) one or more of four specified circumstances exist. (§ 946.6, subd. (c).) The two circumstances relevant here are stated in section 946.6, subdivision (c)(1): "The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements of Section

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[1] All further statutory references are to the Government Code.

945.4"; and subdivision (c)(3): "The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of that disability failed to present a claim during that time."

"An order denying a petition for relief from the TCA claim filing requirements is an appealable order. [Citations.] 'The determination of the trial court in granting or denying a petition for relief under Government Code section 946.6 will not be disturbed on appeal except for an abuse of discretion. Abuse of discretion is shown where uncontradicted evidence or affidavits of the plaintiff establish adequate cause for relief.' [Citation.] 'Government Code section 946.6 is a remedial statute intended to provide relief from technical rules which otherwise provide a trap for the unwary. The remedial policy underlying the statute is that wherever possible cases should be heard on their merits. Thus, a *denial* of such relief by the trial court is examined more rigorously than where relief is granted and any doubts which may exist should be resolved in favor of the application.' [Citation.] Nonetheless, we 'cannot arbitrarily substitute our judgment for that of the trial court.' [Citation.]" (*Barragan v. County of Los Angeles* (2010) 184 Cal.App.4th 1373, 1382 (*Barragan*).)

II. The Trial Court Did Not Abuse its Discretion in Denying Sanudo's Petition

As explained above, section 946.6 requires that the trial court make two separate findings to grant a petitioner relief from her failure to present a timely TCA claim to the relevant public entity. The trial court must find the petitioner applied for relief from the entity pursuant to section 911.4 within a "reasonable time" not exceeding one year after the cause of action accrued. (§ 946.6, subd. (c).) The court must also conclude the petitioner's failure to present a claim within the original six-month period was due to one of the circumstances listed in section 946.6, subdivision (c)(1) to (c)(4). (*DeYoung v. Del Mar Thoroughbred Club* (1984) 159 Cal.App.3d 858, 864 (*DeYoung*) [a person seeking leave to file a late claim must surmount two hurdles].) Sanudo did not present evidence to support either finding.

A. Sanudo Did Not Establish She Presented Her Application to File a Late Claim Within a "Reasonable Time" Under Section 946.6, subdivision (c)

It was not an abuse of discretion for the trial court to conclude Sanudo did not present her application to file late claims within a "reasonable time" under section 911.4, subdivision (b) and section 946.6, subdivision (c). Sanudo fell on a sidewalk in Long Beach on October 3, 2009. She retained counsel in May 2010. She did not present her section 911.4 applications until the very end of the one-year period, in late September or early October 2010.[2] Thus, there were two delays that affected the timing of Sanudo's section 911.4 applications: Sanudo's initial delay in seeking counsel, and counsel's subsequent delay in realizing a TCA claim was required. The trial court could determine that neither delay was reasonable.

Drummond v. County of Fresno (1987) 193 Cal.App.3d 1406 (*Drummond*), is instructive. In *Drummond*, the petitioner suffered an injury while swimming in a river. He was rendered a permanent quadriplegic and was hospitalized for five months. (*Id.* at p. 1408.) He contacted a lawyer eight months after the accident. (*Id.* at p. 1409.) The lawyer advised the petitioner that a claim would have to be filed against a public entity. The petitioner then promptly applied for leave to file a late claim. The application

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[2] In the trial court, respondents argued Sanudo did not present the section 911.4 applications within one year of the accrual of the cause of action. At the hearing on the petition, Sanudo argued that service was complete upon deposit of the applications with the postal service and, in light of documents indicating the applications were delivered on Monday, October 4, 2010, it was clear they were deposited before Sunday, October 3, 2010, the one-year date. The evidence presented to the trial court included mailing receipts showing the applications were delivered on October 4. On appeal, Sanudo again argues the applications were presented within the one-year period, explicitly relying on section 915.2, which provides that if mailed in accordance with statutory requisites, an application for leave to present a late claim is deemed presented at the time of deposit. Although the trial court referred to "section 914.4" in its ruling denying Sanudo's petition, it did not make an explicit finding that Sanudo missed the one-year deadline. Because section 911.4 concerns both the one-year absolute deadline and the "reasonable time" determination, and we conclude the trial court properly denied Sanudo's petition because of her failure to meet the "reasonable time" requirement, we do not consider the one-year deadline issue.

was denied. (*Id.* at p. 1408.) The trial court concluded the petitioner did not prove his application was filed within a reasonable time after the accident, even though it was filed within one year. (*Ibid.*)

The Court of Appeal found no abuse of discretion. The court noted the petitioner had the burden of proving the application was filed within a reasonable time. (*Drummond, supra,* at p. 1411.) The only explanation the petitioner offered for the delay was that because of his physical disability and mental preoccupation with his condition, he did not consult a lawyer or think about a possible legal action until "some time" after he was discharged from the hospital. The court concluded: "Under all of the evidence, including the testimony about appellant's mental and emotional progress and his ability to contact a lawyer while in the hospital, there was room for the trial court to draw an inference that a reasonable person in appellant's position would have consulted an attorney before February 12. Whatever time would have been reasonable for appellant to consult a lawyer under the particular circumstances confronting appellant after he left the hospital was a factual determination to be made by the trial judge which we cannot upset." (*Id.* at p. 1411.)

Similarly, while there was evidence in this case that Sanudo's physical mobility was extremely limited for several months after the accident, there was no evidence suggesting she could not use a telephone or a computer to research or contact attorneys, or was otherwise prevented from consulting counsel. The trial court could infer that a reasonable person in her position would have consulted an attorney before late May 2010, seven months after the accident.

Further, the trial court could conclude the delay occurring after Sanudo retained counsel was not excusable or reasonable. Although Sanudo fell on a sidewalk, neither she nor her counsel investigated whether a government entity might be a possible defendant. Counsel declared that once his office was retained "an investigation was undertaken and a preservation of evidence letter was mailed to the Long Beach Comprehensive Health Center." However, there was no explanation of what, if anything, Sanudo or her counsel did to advance her claim in the approximately three and one-half

months that followed. Indeed, it appears that counsel did not follow up on his letter to the Health Center, and only happened to receive a call from the County alerting him that a TCA claim would be necessary. This was not a case in which there was evidence showing counsel diligently investigated the claims and attempted to discover the proper defendants. (*City of Fresno v. Superior Court* (1980) 104 Cal.App.3d 25, 33-34 [attorney's failure to investigate a claim is not excusable neglect meriting relief under section 946.6]; cf. *Kaslavage v. West Kern County Water Dist.* (1978) 84 Cal.App.3d 529, 535-536.) Nor is it a case in which counsel or the injured person had a well-founded mistaken belief about the identity of the defendant, or in which delay was caused by a calendaring error. (*Nilsson v. City of Los Angeles* (1967) 249 Cal.App.2d 976, 980.) Counsel's inaction is imputed to Sanudo. (*Greene v. State of California* (1990) 222 Cal.App.3d 117, 122 (*Greene*).)

DeYoung, supra, 159 Cal.App.3d 858, also concerned a petitioner's failure to present a late claim application within a reasonable time due to counsel's inaction. In *DeYoung,* the petitioner was injured while attending races sponsored by the Del Mar Thoroughbred Club (the Club) at a racetrack in August 1981. (*Id.* at p. 861.) She retained counsel less than one month after the accident. The attorney met a claims adjuster and a lawyer for the Club at the scene of the accident. The attorney asked the claims adjuster " 'who the correct entity at the track who would be responsible was.' " (*Ibid.*) The claims adjuster said the Club was "the entity." The attorney conducted no further investigation and filed suit against the Club. In May or June 1982, the attorney learned that the State of California owned the racetrack and leased the premises to the Club. (*Ibid.*) In August 1982, the petitioner applied for permission to file a late claim. The application was denied. (*Ibid.*)

The Court of Appeal found the trial court did not abuse its discretion in denying the petitioner relief, in part because the petitioner had not shown her section 911.4 application was made within a reasonable time. The court first explained it was unreasonable for counsel to interpret the claims adjuster's statement that the Club was the responsible entity as an indication that it was the sole owner of the premises.

(*De Young, supra,* at p. 864.) The court further noted that while counsel learned the State might own the racetrack in May or June, the section 911.4 application was not made until August. The attorney explained the "time lapse" was due to the Club's delay in providing him with a copy of the lease, but he did not explain "why he felt it necessary to delay the filing until the lease was received," and his statement that he believed the lease was vital was "belied by his actions." (*Ibid.*) The court indicated that "reliance on an adversary's assurances that discovery documents would be 'forthcoming' in face of a tolling statute seems to show inexcusable neglect." (*Id.* at pp. 864-865.)

Likewise, here the trial court could infer that counsel's failure to consider or investigate whether a public entity was involved was not reasonable, and the resulting delay in the filing of the section 911.4 application was also unreasonable, even though it fell within the one-year period. Under the circumstances presented in this case, we cannot find the trial court abused its discretion in concluding Sanudo did not file her section 911.4 application within a reasonable time. (*Greene, supra,* 222 Cal.App.3d at pp. 122-123; *Clark v. City of Compton* (1971) 22 Cal.App.3d 522, 528.)

B. Sanudo Did Not Establish a Basis for Relief Under Section 946.6, Subdivisions (c)(1) or (c)(3)

Even if the trial court had concluded Sanudo presented her application for leave to file a late claim within a "reasonable time" under section 911.4, the trial court would still have properly denied Sanudo's petition because she did not establish that her failure to file a claim within six months of the accident was due to excusable neglect, or physical disability.

i. No evidence of mistake, inadvertence, surprise, or excusable neglect

"Relief from the failure to timely present a government tort claim is available only if the petitioner establishes by a preponderance of the evidence the failure was 'through mistake, inadvertence, surprise, or excusable neglect.' (§ 946.6, subd. (c)(1); [Citation].) However, '[t]he mere recital of mistake, inadvertence, surprise or excusable neglect is not sufficient to warrant relief. Relief on grounds of mistake, inadvertence, surprise or excusable neglect is available only on a showing that the claimant's failure to timely

present a claim was reasonable when tested by the objective "reasonably prudent person" standard. The definition of excusable neglect is defined as "neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances." ' [Citations.]" (*Renteria v. Juvenile Justice, Department of Corrections and Rehabilitation* (2006) 135 Cal.App.4th 903, 909-910.)

"Generally, the mere ignorance of the time limitation for filing against a public entity is not a sufficient ground for allowing a late claim. [Citation.] Moreover, ignorance of the possible cause of action against the public entity is insufficient to constitute excusable neglect. 'Failure to discover the alleged basis of the cause of action in time is also not a compelling showing in the absence of reasonable diligence exercised for the purpose of discovering the facts.' [Citations.]" (*Harrison v. County of Del Norte* (1985) 168 Cal.App.3d 1, 7.) "[L]ack of knowledge alone is not considered a sufficient basis for relief, when the claimant did not make an effort to obtain counsel . . . . '[D]ue diligence requires at least consultation with legal counsel.' [Citations.]" (*Barragan, supra,* 184 Cal.App.4th at p. 1383.) " '[A] petitioner may not successfully argue excusable neglect when he fails to take *any* action in pursuit of the claim within the [six-month] period. "[T]he claimant must at a minimum make a diligent effort to obtain legal counsel within [six months] after the accrual of the cause of action . . . . The reasonable and prudent course of conduct under the circumstances of this case was to seek legal counsel." [Citation.]' " (*Ibid.*, fn. omitted, quoting *Bertorelli v. City of Tulare* (1986) 180 Cal.App.3d 432, 439 and *Ebersol v. Cowan* (1983) 35 Cal.3d 427, 439.) However, " 'even the failure to obtain legal advice will be excused when a different course of action is reasonably prudent. . . .' [Citation.]" (*Barragan, supra,* at p. 1384.)

Sanudo contends she did not consult with counsel earlier because of her physical limitations following the accident. In *Barragan,* the court held that excusable neglect can be the result of disability. "When a claimant is disabled, even if not so limited as to satisfy the incapacity basis for relief, that disability could justify a trial court in concluding that the claimant's failure to contact an attorney was itself excusable neglect." (*Barragan, supra,* 184 Cal.App.4th at p. 1384.) But the court also acknowledged that

"every claimant is likely to be suffering from some degree of emotional upset, and it takes an exceptional showing for a claimant to establish that his or her disability reasonably prevented the taking of necessary steps. [Citations.]" (*Id.* at p. 1385.)

Sanudo did not make an "exceptional showing" in this case. Although she offered evidence that she had shoulder, wrist, and knee injuries, and could not move around freely without assistance, there was no evidence that she could not use a telephone or the internet. Searching for an attorney did not necessarily require that she physically travel from office to office. Likewise, she presented no evidence in the trial court indicating she was under the influence of medication that affected her thought processes or consciousness. (Cf. *Barragan*, *supra,* at p. 1385 [excusable neglect where petitioner was depressed, in pain, under the influence of medication, unable to sit up without assistance, did not leave bedroom to watch television, and was focused on relearning basic tasks of everyday life].) Sanudo did not establish that her failure to consult counsel before the time passed to present a TCA claim was excusable neglect resulting from her physical disability. "A person seeking relief must show more than just failure to discover a fact until too late; or a simple failure to act." (*Department of Water & Power v. Superior Court* (2000) 82 Cal.App.4th 1288, 1296.) To the extent the trial court found Sanudo did not prove she was entitled to relief under section 946.6, subdivision (c)(1), it did not abuse its discretion.

ii. No evidence of physical disability as a justification

Sanudo's argument that her physical disability prevented her from filing a timely claim was equally flawed. As explained in *Barragan*, "[t]o establish incapacity as a justification for relief from the TCA requirements, a claimant must establish that he or she 'was physically or mentally incapacitated during all of the [six-month period] for the presentation of the claim and by reason of that disability failed to present a claim during that time.' (Gov. Code, § 946.6, subd. (c)(3).) The inquiry focuses only [on] the state of the *claimant*; it is not relevant if others could have voluntarily filed a claim on the claimant's behalf. [Citations.] However, if the claimant's condition was such that the *claimant could have authorized* another to file the claim on his or her behalf, the claimant

was not incapacitated from filing the claim. [Citation.] In other words, the type of disability which justifies relief from the TCA on the grounds of incapacity is an all-encompassing disability which prevents the claimant from even authorizing another to file a claim for the claimant." (*Barragan, supra,* 184 Cal.App.4th at p. 1384.)

Sanudo's evidence established that her physical mobility was limited, but not that she was mentally or cognitively impaired in any way, hospitalized, or unable to plan, reason, or communicate effectively. (*Barragan, supra*, 184 Cal.App.4th at p. 1384.) Sanudo offered no evidence indicating she suffered from an all-encompassing disability that prevented her from authorizing someone else to file a claim for her. She did not show she was entitled to relief under section 946.6, subdivision (c)(3).

DISPOSITION

The order is affirmed. Respondents shall recover their costs on appeal.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.